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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 22, and 52

[FAC 2005-85; FAR Case 2015-003; Item VI; Docket No. 2014-0050; Sequence No. 1]

RIN 9000-AM82

Federal Acquisition Regulation: Establishing a Minimum Wage for Contractors

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement the Executive Order (E.O.) Establishing a Minimum Wage for Contractors, and a final rule issued by the Department of Labor (DOL).

DATES: Effective: **[Insert date of publication in the FEDERAL REGISTER.]**

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb, Procurement Analyst, at 202-501-0650 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat

at 202-501-4755. Please cite FAC 2005-85, FAR Case 2015-003.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the Federal Register at 79 FR 74544 on December 15, 2014, to implement Executive Order (E.O.) 13658, Establishing a Minimum Wage for Contractors, and a final rule issued by DOL at 29 CFR part 10. A correction to the interim rule was published at 79 FR 75434 on December 18, 2014 establishing the rule's effective date as December 15, 2014. For a discussion of the FAR implementation of the E.O., see the interim rule. One respondent submitted a public comment on the interim rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comment submitted in the development of the final rule. A discussion of the comment follows.

A. Changes

The interim rule is converted to a final rule with only minor changes.

B. Analysis of public comment

One respondent submitted one comment.

Comment: Although the respondent was generally supportive of the intent of the E.O. raising the minimum wage for workers performing on or in connection with Federal contracts, the respondent expressed deep concern that the E.O. and the implementing FAR rule will have a negative impact on the employment of individuals with significant disabilities, specifically those who earn commensurate wages under special subminimum wage certificates issued by DOL pursuant to Section 14(c) of the Fair Labor Standards Act (FLSA). The respondent suggested a number of actions that the Federal Government could take to mitigate unintended consequences of the rule:

1. Provide adequate funding to ensure no workers with disabilities lose their jobs as a result of wage increases required by the rule.

2. Compile data regarding the number of such individuals displaced from employment or shifted to non-Federal contract work as a result of the rule.

3. Allow contractors to request a price adjustment for these individuals based on the difference between the current wage paid and the higher E.O. minimum wage, and provide an example of such a price adjustment in the rule.

Response: Executive Order 13658 expressly provides that its minimum wage protections extend to workers with

disabilities whose wages are governed pursuant to special certificates issued under Section 14(c) of the FLSA. The Councils appreciate the concerns raised by this respondent regarding the potential loss of employment that could result from requiring that the E.O. minimum wage be paid to FLSA Section 14(c) workers, particularly workers with significant disabilities, performing on or in connection with covered contracts who are currently paid a lower commensurate wage rate. The Councils do not have the discretion to adjust the rule, as the rule implements the E.O. and the DOL implementing regulation, which both specifically require application of the rule to workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c).

With regard to the respondent's suggestions for mitigating negative impacts—

1. The E.O. did not provide for appropriation of funds to ensure that no workers with disabilities lose their jobs;

2. The E.O. did not require information or data collection methods in order to evaluate the rule's effects; therefore, this suggestion is beyond the scope of the E.O., and outside the implementation of the FAR rule; and

3. When contracts become subject to the E.O., the minimum wage is considered in the contract price either through the offer/bid process when an offeror is responding to a solicitation or, in the case of a modification, through appropriate consideration, in accordance with FAR conventions (see FAR 1.108(d)(3)), therefore explicit price adjustment language is not necessary. However, the rule does provide that contractors may request price adjustments for any worker based on an increase in labor costs resulting from the annual inflation increases in the E.O. minimum wage beginning January 1, 2016. This is depicted in the table at FAR 22.1904(b)(2). The Councils have revised the language at FAR paragraph 22.1904(b)(2) and in the table to specify that service or construction wage determination rates should only be considered if they are applicable to the worker. The revised language recognizes that workers with disabilities whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c) may not have been paid the full applicable service wage determination rate.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to

select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant rule and, therefore, not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This rule is needed to implement Executive Order (E.O.) 13658, Establishing a Minimum Wage for Contractors, dated February 12, 2014, and associated Department of Labor (DOL) regulatory requirements at 29 CFR part 10.

The interim rule published December 15, 2014 (and correction published December 18, 2014) established requirements for contractors with covered contracts containing the FAR clauses at 52.222-6, Construction Wage Rate Requirements, or 52.222-41, Service Contract Labor Standards, i.e., "covered contracts," to pay no less than the applicable E.O. minimum wage to workers for all hours worked on or in connection with a covered contract. Contractors must also include a minimum wage contract clause in covered subcontracts and require covered subcontractors to include the substance of the clause in covered lower-tier contracts.

The objective of this rule is to implement the above referenced E.O. and DOL requirements. To accomplish this implementation, the interim rule established a new FAR clause, 52.222-55, Minimum Wages Under Executive Order 13658, and mandated its inclusion in all covered contracts (and in subcontracts as indicated above) performed wholly, or in part, in the United States.

No public comments were submitted in response to the initial regulatory flexibility analysis. Therefore, there were no issues to assess, and no changes to the rule were necessary.

This rule applies to new contracts and subcontracts at all tiers covered by the Service Contract Labor Standards statute, or the Wage Rate Requirements (Construction) statute, which require performance in whole or in part within the United States. When performance is in part within and in part outside the United States, the rule applies to the part of the contract or subcontract performed within the United States.

The rule applies to workers as defined at FAR 22.1901. As provided in that definition—

- Workers are covered regardless of the contractual relationship alleged to exist between the contractor or subcontractor and the individual;
- Workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), are covered; and
- Workers registered in a bona fide apprenticeship program or training program registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship, are covered.

This rule does not apply to—

- Fair Labor Standards Act (FLSA)-covered workers performing in connection with covered contracts, i.e., those workers who perform duties necessary to the performance of the contract, but who are not directly engaged in performing the specific work called for by the contract, and who spend less than 20 percent of their hours worked in a particular workweek performing in connection with such contracts.

- Individuals exempted from the minimum wage requirements of the FLSA under 29 U.S.C. 213(a) and 214(a) and (b), unless otherwise covered by the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute. These individuals include but are not limited to-

- (i) Learners, apprentices, or messengers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a);

- (ii) Students whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(b); and

- (iii) Individuals employed in a bona fide executive, administrative, or professional capacity (29 U.S.C. 213(a)(1) and 29 CFR part 541).

Small businesses in the service or construction industry with covered FAR-based contracts or subcontracts for which the solicitation was issued on or after December 15, 2014 are impacted unless an exclusion listed above applies. The rule requires these contractors and subcontractors to raise their workers' minimum hourly rate to \$10.10 per hour, beginning January 1, 2015, then annually adjust it thereafter, if necessary, based on the annual minimum wage rate determined by DOL.

Data available through the Federal Procurement Data System (FPDS) for Fiscal Year 2013, reveals 16,264 contracts were awarded to unique small business vendors for services which contained the FAR clause at 52.222-41, Labor Standards. Additionally, 5,211 contracts were awarded to unique small business vendors for construction which contained the FAR clause at 52.222-6, Construction Wage Rate Requirements, for a total of 21,475 unique small businesses. Subcontract data is available from the USASpending Federal Funding Accountability and Transparency Act Subaward Reporting System (FSRS); however, this system does not distinguish small businesses from other than small businesses. Data for Fiscal Year 2013 shows there were a total of 20,127 subcontracts for services and construction reported, and of those, 5,391 were unique Data Universal Numbering System (DUNS). These 5,391 first tier unique subcontracts are approximately 25 percent of the 21,475 unique contracts. Given that first tier subcontracts account for 25 percent, then for estimating purposes, 20 percent of subcontracts have a second tier, 10 percent of second tier have a third tier, and 5 percent of third tier have a fourth tier. This calculation estimates the total number of subcontracts is 6,631. However, since the FSRS does

not distinguish small businesses, this is likely an overestimate.

DOL noted in its final rule (79 FR 60634 at 60691) that the rule did not impose any additional notice or recordkeeping requirements on contractors and therefore, the burden for complying with the recordkeeping requirements was not adjusted. However, DOL submitted a revised information collection request (ICR), to the Office of Management and Budget to revise the existing Information Collection Request for control number 1235-0018 to incorporate the recordkeeping regulatory citations in its final rule.

DOL, in its final rule, estimated the average wage for affected employees is \$8.79; thus, affected firms must raise the hourly wage for affected employees by \$1.31 per hour. Additionally, contractors must adjust related payroll and unemployment taxes and fringe benefits. Under covered contracts, contractors are entitled to recover increases in labor costs resulting from the E.O. minimum wage requirements by including such costs in their offers and when requesting contract price adjustment under existing and future contracts for the additional costs related to the increase in the minimum wage rate for workers performing under the contract. DOL notes increases in economy and efficiency and expects these added costs to be offset by an increase in employee morale and productivity, reduced absenteeism, reduced supervisory costs, and reduced turnover.

To remind contractors of their obligation to ensure that subcontractor workers are paid in compliance with the minimum wage requirement, the following text was included in the FAR clause 52.222-55, Minimum Wages Under Executive Order 13658:

(j) Subcontractor compliance. The contractor is responsible for subcontractor compliance with the requirements of this subpart, and may be held liable for unpaid wages due subcontractor's workers.

The rule provides that subcontractors may be entitled to adjustments due to the new minimum wage and that contractors shall consider any subcontractor(s) requests for such price adjustment (52.222-55(b)(3)(ii)).

The rule does not address late payments to small business subcontractors, however pending FAR case 2014-004 implements section 1334 of the Small Business Jobs and Credit Act of 2010 (Public Law 111-240) and the Small Business Administration's final rule at 78 FR 42391. The rule will require a

contractor to self-report to the contracting officer when the contractor makes late or reduced payments to small business subcontractors.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C chapter 35) does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 1235-0018, Records to be Kept by Employers—Fair Labor Standards Act.

List of Subjects in 48 CFR Parts 1, 22, and 52

Government procurement.

Dated: November 20, 2015.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

INTERIM RULE ADOPTED AS FINAL WITH CHANGES

Accordingly, the interim rule amending 48 CFR parts 22 and 52, which was published in the Federal Register at 79 FR 74544 on December 15, 2014, is adopted as final with the following changes:

1. The authority citation for 48 CFR parts 22 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT

ACQUISITIONS

2. Amend section 22.1904 by revising the first two sentences in paragraph (b)(1) and paragraph (b)(2) to read as follows:

22.1904 Annual Executive Order minimum wage rate.

* * * * *

(b) (1) The contractor may request a price adjustment only after the effective date of a new annual E.O. minimum wage determination published pursuant to paragraph (a). Prices will be adjusted only for increased labor costs (including subcontractor labor costs) as a result of the annual E.O. minimum wage, and for associated labor costs (including those for subcontractors. * * *

(2) The wage rate price adjustment under this clause is the lowest amount calculated by subtracting from the new E.O. wage rate the following: the current E.O. minimum wage rate; the current service or construction wage determination rate under the contract (if the wage rate is applicable to that worker); or the actual wage currently paid the worker. If the amount is zero or below, there will be no increase paid for this worker.

| (i) Example 1 - New E.O. wage rate is \$11.10 | |
|--|---|
| Previous E.O. wage rate is \$10.70. | Analysis: The calculation is $\$11.10 - \$10.80 = \$0.30$. The price adjustment for this worker is \$0.30. |
| The current service or construction wage determination rate applicable to this worker under the contract is \$10.75. | |
| The actual wage currently paid to the worker is \$10.80. | |

| | |
|--|---|
| (ii) Example 2 - New E.O. wage rate is \$10.50 | |
| Previous E.O. wage rate is \$10.10. | Analysis: The calculation is \$10.50 - \$10.80 = - \$.30. There is no price adjustment for this worker. |
| The current service or construction wage determination rate applicable to this worker under the contract is \$10.75. | |
| The actual wage currently paid to the worker is \$10.80. | |

3. Amend section 22.1905 by revising paragraph (a) (2) and adding paragraph (a) (3) to read as follows:

22.1905 Enforcement of Executive Order minimum wage requirements.

(a) * * *

(2) Contracting officers shall withhold payment at the direction of the Administrator.

(3) The contracting officer shall withhold payment, without a request from the Administrator, if the contractor fails to comply with the requirements in paragraph (e) (2) of 52.222-55, Minimum Wages Under Executive Order 13658 to furnish payroll records, until such time as the noncompliance is corrected.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend 52.212-5 by:

- a. Revising the date of the clause;
- b. Revising paragraphs (c) (8) and (e) (1) (xv); and
- c. In Alternate II, revising paragraph (e) (1) (ii) (N).

The revisions read as follows:

**52.212-5 Contract Terms and Conditions Required to
Implement Statutes or Executive Orders—Commercial Items**

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE
ORDERS—COMMERCIAL ITEMS ([INSERT ABBREVIATED MONTH AND YEAR OF
PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

(c) * * *

(8) 52.222-55, Minimum Wages Under Executive
Order 13658 ([INSERT ABBREVIATED MONTH AND YEAR OF
PUBLICATION IN THE FEDERAL REGISTER]) (E.O. 13658).

* * * * *

(e) (1) * * *

(xv) 52.222-55, Minimum Wages Under Executive
Order 13658 ([INSERT ABBREVIATED MONTH AND YEAR OF
PUBLICATION IN THE FEDERAL REGISTER]) (E.O. 13658).

* * * * *

Alternate II * * *

(e) (1) * * *

(ii) * * *

(N) 52.222-55, Minimum Wages Under Executive
Order 13658 ([INSERT ABBREVIATED MONTH AND YEAR OF
PUBLICATION IN THE FEDERAL REGISTER]) (E.O. 13658).

* * * * *

5. Amend section 52.213-4 by revising the date of the clause and paragraphs (a) (2) (viii) and (b) (1) (ix) to read as follows:

**52.213-4 Terms and Conditions—Simplified Acquisitions
(Other than Commercial Items)**

* * * * *

TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL ITEMS) ([INSERT ABBREVIATED MONTH AND YEAR OF PUBLICATION IN THE FEDERAL REGISTER])

(a) * * *

(2) * * *

(viii) 52.244-6, Subcontracts for Commercial Items ([INSERT ABBREVIATED MONTH AND YEAR OF PUBLICATION IN THE FEDERAL REGISTER]).

* * * * *

(b) * * *

(1) * * *

(ix) 52.222-55, Minimum Wages Under Executive Order 13658 ([INSERT ABBREVIATED MONTH AND YEAR OF PUBLICATION IN THE FEDERAL REGISTER]) (Executive Order 13658) (Applies when 52.222-6 or 52.222-41 are in the contract and performance in whole or in part is in the United States (the 50 States and the District of Columbia)).

* * * * *

6. Amend section 52.222-55—

a. By revising the date of the clause;

b. In paragraph (a), amending the definition of "worker" by—

1. Adding an em-dash to the end of paragraph (1) introductory text;

2. Removing the comma from the end of paragraph (1)(i) and adding a semicolon in its place; and

3. Removing the comma from the end of paragraph (1)(ii) and adding "; and" in its place;

c. Revising the heading of paragraph (b); and

d. Revising paragraphs (b)(2) and (b)(3)(i).

The revisions read as follows:

52.222-55 Minimum Wages Under Executive Order 13658.

* * * * *

MINIMUM WAGES UNDER EXECUTIVE ORDER 13658 ([INSERT THE ABBREVIATED
MONTH AND YEAR OF PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

(b) Executive Order minimum wage rate. * * *

(2) The Contractor shall adjust the minimum wage paid, if necessary, beginning January 1, 2016, and annually thereafter, to meet the applicable annual E.O. minimum wage. The Administrator of the Department of Labor's Wage and Hour Division (the Administrator) will publish annual determinations in the Federal Register no later than 90 days before the effective date of the new E.O. minimum wage

rate. The Administrator will also publish the applicable E.O. minimum wage on www.wdol.gov (or any successor website), and a general notice on all wage determinations issued under the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute, that will provide information on the E.O. minimum wage and how to obtain annual updates. The applicable published E.O. minimum wage is incorporated by reference into this contract.

(3)(i) The Contractor may request a price adjustment only after the effective date of the new annual E.O. minimum wage determination. Prices will be adjusted only for increased labor costs (including subcontractor labor costs) as a result of an increase in the annual E.O. minimum wage, and for associated labor costs (including those for subcontractors). Associated labor costs shall include increases or decreases that result from changes in social security and unemployment taxes and workers' compensation insurance, but will not otherwise include any amount for general and administrative costs, overhead, or profit.

* * * * *

7. Amend 52.244-6 by revising the date of the clause and paragraph (c)(1)(xi) to read as follows:

52.244-6 Subcontracts for Commercial Items.

* * * * *

SUBCONTRACTS FOR COMMERCIAL ITEMS (**[INSERT ABBREVIATED MONTH AND YEAR OF PUBLICATION IN THE FEDERAL REGISTER]**)

* * * * *

(c) (1) * * *

(xi) 52.222-55, Minimum Wages under Executive Order 13658 (**[INSERT ABBREVIATED MONTH AND YEAR OF PUBLICATION IN THE FEDERAL REGISTER]**) .

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